NO. 83-6215

Supreme Court, U.S.
FILED
MAR 10 1984
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT FRANKLIN GODFREY,

Petitioner,

v.

ROBERT FRANCIS, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record
For the Respondent

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

132 State Judicial Bldg.
40 Capitol Square
Atlanta, Georgia 30334
(404) 656-3349

QUESTIONS PRESENTED

1.

Was the double jeopardy allegation decided by the Supreme Court of Georgia on an adequate nonfederal ground, thereby precluding review by this Court, or in the alternative, did the Supreme Court of Georgia on the initial direct appeal properly conclude that this allegation was without merit?

2.

Did the trial court properly decline to excuse two jurors for cause based on their opinions concerning the imposition of the death penalty?

3.

Did the Supreme Court of Georgia properly conclude that the charge of the trial court did not impermissibly shift the burden of proof or persuasion to the Petitioner?

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED.	i
STATEMENT OF THE CASE.	1
STATEMENT OF FACTS	4
REASONS FOR NOT GRANTING THE WRIT.	7
I. THIS COURT SHOULD DECLINE TO CONSIDER THE ISSUE ALLEGING A DOUBLE JEOPARDY VIOLATION AS THE STATE HABEAS CORPUS COURT AND THE STATE SUPREME COURT DID NOT CONSIDER THE FEDERAL CONSTITUTIONAL CLAIM BASED ON AN ADEQUATE AND INDEPENDENT STATE PROCEDURAL GROUND; FURTHERMORE, THIS ISSUE IS WITHOUT MERIT	7
II. THE TRIAL COURT PROPERLY DECLINED TO EXCUSE TWO POTENTIAL JURORS FOR CAUSE BASED ON THEIR OPINIONS CONCERNING THE DEATH PENALTY.	13
III. THE CHARGE TO THE JURY AT THE GUILT-INNOCENCE PHASE WAS NOT IMPERMISSIBLY BURDEN-SHIFTING	16
CONCLUSION	22
CERTIFICATE OF SERVICE	23

TABLE OF AUTHORITIES

Page(s)

Cases cited:

Bullington v. Missouri, 451 U.S. 430 (1981) . 9, 11, 12,

Burks v. United States, 437 U.S. 1 (1978) . . 9,

Corn v. Zant, 708 F.2d 549 (11th Cir. 1983) . 18, 19, 20

Cupp v. Naughten, 414 U.S. 141 (1973) 17,

Drake v. Francis, No. 83-8047 (11th Cir. Feb. 29, 2984) 19,

Franklin v. Francis, 720 F.2d 1206 (11th Cir. 1983). 16, 19, 20, 21

Franklin v. State, 245 Ga. 141, 263 S.E.2d 666 (1980). 21,

Godfrey v. Francis, 251 Ga. 652, ___ S.E.2d ___ (1983). . . . . Passim

Godfrey v. Georgia, ___ U.S. ___, 102 S.Ct. (1981), rehearing denied, ___ U.S. ___, 102 S.Ct. 2286 (1982) 2,

Godfrey v. Georgia, 446 U.S. 420 (1980) . . . 2, 8, 10

Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1979). 2, 6

Godfrey v. State, 246 Ga. 359, 274 S.E.2d 339 (1980). 2,

Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981) 2, 7, 8,

Green v. United States, 355 U.S. 184, (1957). 12,

Gregg v. Georgia, 428 U.S. 153 (1976) 10

Hance v. Zant, 696 F.2d 940 (11th Cir. 1983). 15, 17, 20, 21

Herb v. Pitcairn, 324 U.S. 117 (1944) 8,

Hosch v. State, 246 Ga. 417, 271 S.E.2d 817 (1980) 16,

Lamb v. Jernigan, 683 F.2d 1332 (11th Cir. 1982) 17,

Sandstrom v. Montana, 444 U.S. 510 (1979) . . 16, 18, 19, 20

Tucker v. Francis, 723 F.2d 1504 (11th Cir. 1984). 19,

Witherspoon v. Illinois, 391 U.S. 510 (1968). 13, 15,

Zant v. Campbell, 245 Ga. 368, 265 S.E.2d 22 (1980), cert. denied, 449 U.S. 891 (1981) 7,

Statutes cited:

O.C.G.A. § 17-10-30(b)(2);
Ga. Code Ann. § 27-2531.(b)(2). 2, 9

O.C.G.A. § 17-10-30(b)(7);
Ga. Code Ann. § 27-2534.1(b)(7). 1, 8

NO. 83-6215

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT FRANKLIN GODFREY,

Petitioner,

v.

ROBERT FRANCIS, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Robert Franklin Godfrey, was indicted by the grand jury of Polk County on December 15, 1977, at which time he was charged with the murder of his wife, Mildred Godfrey, and the murder of his mother-in-law, Chessie C. Wilkerson. Petitioner was also charged with aggravated assault on his daughter, Tracey Godfrey.

A trial by jury was begun on March 6, 1978. At the conclusion of that trial, Petitioner was convicted on all counts and sentenced to the death penalty based upon a partial finding of the seventh statutory aggravating circumstance. O.C.G.A. § 17-10-30(b)(7); Ga. Code Ann. § 27-2534.1(b)(7). On

direct appeal, the Supreme Court of Georgia affirmed the convictions and sentences. Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1979).

A petition for a writ of certiorari was filed in the United States Supreme Court and was granted by the Court. On consideration of the questions presented, this Court reversed the death penalty and remanded the case to the Supreme Court of Georgia for further consideration. Godfrey v. Georgia, 446 U.S. 420 (1980). On remand, the Supreme Court of Georgia directed that the case be sent back to the trial court for either the imposition of a life sentence or for a new sentencing trial. Godfrey v. State, 246 Ga. 359, 274 S.E.2d 339 (1980).

Beginning on November 17, 1980, a second sentencing trial was held in the Superior Court of Polk County. At that time, the jury again imposed the death penalty as to each count of murder based on a finding that each murder was committed during the course of another murder. O.C.G.A. § 17-10-30(b)(2); Ga. Code Ann. § 27-2534.1(b)(2). On direct appeal to the Supreme Court of Georgia, the court concluded that the two statutory aggravating circumstances were mutually supporting and vacated the death penalty for the murder of Mildred Godfrey, but affirmed the convictions and the other death sentence. Godfrey v. State, 248 Ga. 616, 284 S.E.2d 442 (1981). A motion for rehearing was denied on December 16, 1981. A subsequent petition for a writ of certiorari was denied by the Supreme Court of the United States on April 5, 1982 and a motion for rehearing was denied on May 24, 1982. Godfrey v. Georgia, ___ U.S. ___, 102 S.Ct. (1981), rehearing denied, ___ U.S. ___, 102 S.Ct. 2286 (1982).

Petitioner then filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. A hearing was held on that petition on November 9, 1982. After considering the evidence and the briefs, the state habeas corpus court denied relief on December 21, 1982. On April 11,

1983, the Supreme Court of Georgia granted the application for a certificate of probable cause to appeal.

After reviewing numerous issues, including those presented by the instant petition, the Supreme Court of Georgia concluded that certain issues had been previously raised on direct appeal and were not properly before the court on a petition for a writ of habeas corpus. Therefore, the court specifically did not address those issues. The court then affirmed the denial of state habeas corpus relief after considering the remaining issues. Godfrey v. Francis, 251 Ga. 652, ___ S.E.2d ___ (1983). Petitioner has since filed the instant petition for a writ of certiorari in this Court challenging the decision of the Supreme Court of Georgia.

PART TWO

STATEMENT OF FACTS

The Supreme Court of Georgia on the first direct appeal set forth a detailed statement of the facts of the case as follows:

> On September 5, 1977, [Petitioner's] wife left him after he cut some of her clothes off her body with a knife. She moved in with her mother, refused to move back home, and filed for divorce. She also charged him with aggravated assault.
>
> On the morning of September 20, 1977, [Petitioner] who was employed as a male nurse, told a female nurse that he was getting a divorce and it would be all over on the twenty-first. (The divorce hearing was set for the twenty-second.) On the same day [Petitioner's] mother-in-law called him at work and told him that Mrs. Godfrey would telephone him that evening. She did call, but would not agree to halt the divorce proceedings for an attempted reconciliation. Mrs. Godfrey called back later and again refused to attempt reconciliation.
>
> Petitioner took his single action rifle shotgun and walked to the mother-in-law's trailer home in which Mrs. Godfrey, her daughter, and her mother were playing a game around a table. [Petitioner] killed his wife by shooting her in the head, firing through a window. He struck his eleven-year-old daughter on the head with the barrel of the gun as she ran for help.

[Petitioner] then shot his mother-in-law, killing her. He then called the Polk County Sheriff's office, identified himself, reported the crimes and gave directions to the trailer. He waited at the scene until a policeman arrived. [Petitioner] told the policeman "they're dead. I killed them," and directed the policeman to the murder weapon which was resting in the branches of an apple tree.

After being arrested and advised of his rights, [Petitioner] was taken to the police station where he told a police officer that he had committed a "hideous crime" which he had thought about for eight years and would do again.

The theory of the defense at trial was insanity. The defense psychiatrist described [Petitioner's] behavior during the murders as a "dissociative attack," but did not testify that this was a psychosis of any kind. [Petitioner] denied remembering anything from the time of his second telephone conversation with Mrs. Godfrey until he "woke up" in jail the following day. The defense psychiatrist testified that [Petitioner] could not remember the crimes even after receiving an injection of sodium amytal, a "truth serum" although the drug did not affect him as much as most people, perhaps because of his history of heavy drinking.

> The state presented testimony from experts and other witnesses that [Petitioner] was same and could distinguish right from wrong.

Godfrey v. State, 243 Ga. 302-303.

Further facts will be developed as necessary to examine the issues presented by the instant petition.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO CONSIDER THE ISSUE ALLEGING A DOUBLE JEOPARDY VIOLATION AS THE STATE HABEAS CORPUS COURT AND THE STATE SUPREME COURT RELIED UPON AN ADEQUATE AND INDEPENDENT STATE PROCEDURAL GROUND; FURTHERMORE, THIS ISSUE IS WITHOUT MERIT.

Petitioner in the instant case seeks a writ of certiorari to review the judgment of the state habeas corpus court and the Supreme Court of the State of Georgia denying Petitioner habeas corpus relief. The state habeas corpus court reviewed Petitioner's contention that a double jeopardy violation occurred by his resentencing trial, but found that the prior decision of the Supreme Court of Georgia on direct appeal on the issue was binding because the issue had been raised and decided on direct appeal. See Habeas Corpus Order at 13; Godfrey v. State, 248 Ga. at 617. On appeal from the denial of habeas corpus relief, the Supreme Court of Georgia concluded that this particular allegation had been decided adversely to the Petitioner on his initial direct appeal; therefore, that issue would not be considered again on the appeal from the denial of the petition for a writ of habeas corpus. Godfrey v. Francis, 251 Ga. at 654, citing Zant v. Campbell, 245 Ga. 368, 265 S.E.2d 22 (1980), cert. denied, 449 U.S. 891 (1981). Therefore, the decision of the state habeas corpus court and the Supreme Court of Georgia were based upon adequate state procedural grounds, that is, that a state habeas corpus court will not sit to review issues previously decided on direct appeal. Based on this adequate nonfederal procedural ground, neither the state habeas corpus court nor the Supreme Court of Georgia considered the allegation concerning double jeopardy on its merits.

Before agreeing to review a state court's decision, this Court has required that it be shown that the state court actually decide a federal question and that the decision of the federal question was necessary to the state court's determination of the case. See Herb v. Pitcairn, 324 U.S. 117 (1944). The state habesa corpus court decided no federal question, nor did it need to, as it was precluded from addressing this issue under state procedural rules. Thus, Respondent submits that there is no federal question for review by this Court in this collateral attack.

Even if this Court should find that this issue is properly before it, Respondent submits that the allegation is without merit. Petitioner has asserted that his rights under the double jeopardy clause were violated by his second trial after this Court reversed the death penalty. Respondent submits that no double jeopardy violation occurred by the use of a different aggravating circumstance at a resentencing proceeding.

At the first trial in the Superior Court of Polk County, the jury was presented with one statutory aggravating circumstance for its consideration, that is, "that the offense of murder was outrageously and wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." O.C.G.A. § 17-10-30(b)(7); Ga. Code Ann. § 27-2534.1(b)(7). The jury recommended imposition of the death penalty based only on an incomplete finding of this statutory aggravating circumstance, that is, "that the offense was outrageously or wantonly vile, horrible and inhuamn." Godfrey v. State, supra, 248 Ga. at 618. In reviewing the death penalty imposed under that partial statutory aggravating cicumstance, this Court found, "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." Godfrey v. Georgia, supra, 446 at 428.

Petitioner was subsequently returned to the trial court for resentencing pursuant to the directive of the Supreme Court of

Georgia. At the resentencing trial the jury was instructed on a different statutory aggravating circumstance from that charged in the first trial, that is, that the murders occurred while the offender was engaged in the commission of another capital felony. O.C.G.A. § 17-10-30(b)(2); Ga. Code Ann. § 27-2534.1(b)(2). Petitioner asserted prior to his resentencing hearing and again on direct appeal to the Supreme Court of Georgia that this constituted a jeopardy violation. Petitioner also raises an allegation in the petition for a writ of certiorari filed in this Court asserting that the use of a different statutory aggravating circumstance constituted a violation of the principles of double jeopardy, relying primarily on the holding of the Court in Bullington v. Missouri, 451 U.S. 430 (1981).

In evaluating this issue, it is necessary to consider the previous review of this case by this Court after the first death penalty was imposed and the effect of that decision. Petitioner has asserted that the decision by this Court was, in effect, a decision that the evidence was insufficient to support the finding of the seventh statutory aggravating circumstance; therefore, the resentencing of the Petitioner was improper under Burks v. United States, 437 U.S. 1 (1978). Respondent asserts that Petitioner has misconstrued this Court's holding and also misconstrued the subsequent holding of the Supreme Court of Georgia.

On the initial review of Petitioner's convictions and death sentences, the plurality opinion of this Court stated:

> The issue now before us is whether, in affirming the imposition of the sentences of death in the present case, the Georgia Supreme Court has adopted such a broad and vague construction of the § (b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the

Godfrey v. Gergia, supra, 446 U.S. at 423. Thus, this Court specifically stated that it was reviewing the manner in which the Supreme Court of Georgia conducted its review of the death penalty, not the sufficiency of the evidence presented to the jury.

The plurality opinion went on to discuss the requirement that a state apply its capital punishment law in a manner "that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.'" Id. at 428 quoting Gregg v. Georgia, 428 U.S. 153, 196 n. 47 (1976). The court further emphasized this as the main issue to be considered when the plurality stated the following:

> In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was "outrageously vile, horrible or inhuman." (Footnote omitted). There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death penalty.
>
> * * *
>
> The standardless and unchanneled imposition of death sentences and the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court.

Godfrey v. Georgia, supra, 446 U.S. at 428-9.

The Court then went on to discuss in detail the holdings of the Supreme Court of Georgia regarding the seventh statutory aggravating circumstance. The Court finally concluded that the validity of the death sentence turned on the question of whether the Supreme Court of Georgia applied a constitutional construction to the seventh statutory aggravating circumstance as used in this case. Id. at 432. The later discussion of the plurality of the phrase "depravity of mind" is not relevant to the instant case as no such finding was ever set forth by the jury.

The Supreme Court of Georgia after Petitioner's resentencing determined that this Court's decision in Godfrey v. Georgia, and the subsequent remand by the Supreme Court of Georgia, were based merely on legal grounds, that is, that the verdict of the jury was incomplete because it did not specify the remainder of the statutory aggravating circumstance. This is clearly a trial error contemplated by the previous decision of this Court in that the trial court did not direct the jury to return either a finding of the entire statutory aggravating circumstance or a decision for life imprisonment. As a trial error was the basis for the reversal, the question of the sufficiency of the evidence to support the seventh statutory aggravating circumstance is not relevant at this time. Furthermore, sufficient evidence was presented at the first sentencing proceeding which would have supported a finding of the second statutory aggravating circumstance. See Godfrey v. State, 248 Ga. 618.

Therefore, the instant case is clearly distinguishable from Bullington v. Missouri, supra, as no sufficiency of the evidence problem was presented in the instant case. A significant distinguishing factor also found between the cases is that no death sentence was returned at the first trial in Bullington, supra. At the new trial, the same aggravating circumstances were used and the state announced that the evidence would be the same as the first trial. This Court

placed great reliance on one of the basic premises underlying the double jeopardy clause, that is, that the state "should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Bullington v. Missouri, supra, quoting, Green v. United States, 355 U.S. 184, 187-188 (1957). Therefore, a critical factor in the decision of Bullington was the fact that the state in its first presentation had failed to convince the jury that the death penalty was proper under any circumtances. In the instant case the state did convince the jury that the death penalty was proper and the jury so found; however, an incomplete verdict was returned and a statutory aggravating circumstance that was appropriate and supported by the evidence was simply not presented to the jury. Under these circumstances, the double jeopardy clause should not prevent the use of a different statutory aggravating circumstance at Petitioner's resentencing trial.

As the initial finding of this Court in the plurality opinion was not based on the sufficiency of the evidence, but on a trial error, Respondent asserts that no double jeopardy violation was presented by the retrial on sentencing. Furthermore, even if the decision were to be considered a finding of insufficiency of the evidence, that finding only relates to the particular statutory aggravating circumstance and not the sufficiency of the evidence to impose the death penalty. Clearly, the jury found sufficient facts to justify the death penalty in the case, unlike the decision in Bullington v. Missouri, supra; therefore, this should not be found to be an implied verdict of acquittal on the death penalty. The mere fact that the trial judge for some reason did not charge on the second statutory aggravating circumstance at the first proceeding is insufficient to conclude that this

was an implied acquittal by the trial judge of that statutory aggravating circumstance. This is merely a question of state law as to whether this statutory aggravating circumstance could be utilized at a later proceeding. Therefore, Respondent submits that this allegation is clearly without merit and presents no constitutional question for review by this Court.

II. THE TRIAL COURT PROPERLY DECLINED TO EXCUSE TWO POTENTIAL JURORS FOR CAUSE BASED ON THEIR OPINIONS CONCERNING THE DEATH PENALTY.

Petitioner has challenged the failure of the trial court to excuse potential jurors Powell and Bright for cause based upon their opinions favoring the death penalty. Petitioner asserts that under the principles of Witherspoon v. Illinois, 391 U.S. 510 (1968), the jurors should have been excused because they were unfairly predisposed to vote in favor of capital punishment.

Pretermitting the question of whether it would be proper to excuse jurors who favor the death penalty is the fact that under the circumstances of the instant case, both potential jurors indicated that they could be impartial. The Supreme Court of Georgia on appeal from the state habeas corpus court's decision, reviewed the voir dire examination in detail. That court set forth the voir dore testimony at length in its opinion. Godfrey v. Francis, 251 Ga. at 663.

In reviewing the voir dire examination of potential juror Powell, the Supreme Court of Georgia found the following:

> Viewing the voir dire of this juror as a whole and considering the context in which the contested answers were give, it was not error for the resentencing court to fail to dismiss the juror. . . . The extended, persistent, and confusing questions asked

the prospective juror failed to elicit a clear, adamant expression of a fixed opinion that would be unyielding in spite of law or evidence which required a contrary finding. (Footnote omitted). The defendant cannot create error by eliciting responses to questions that solicit the juror's views on evidence not yet presented and the law to be applied in the case at hand. The juror never stated that he would refuse to apply the law as charged or that he would not follow the court's instructions in considering all the evidence. Later, during voir dire of a subsequent juror, the court reminded the entire panel of the charge given the previous day as to consideration of aggravating circumstances in setting a sentence for murder. The judge then said: "Also you should consider any mitigating circumstances in determining whether or not you recommend a life sentence. You can and should consider the life sentence in any event based on the evidence. I would ask all of you if you have any pre-judgment that you could not follow those instructions if you're selected as a juror." None of the jurors responded and questioning continued.

A review of the entire voir dire examination does not show this juror to be so biased or irrevocably committed to the death penalty that he would ignore the court's instructions pertaining to the jury's sentence recommendation and impose the death penalty under all circumstances in which a murder conviction would be returned.

Id. at 668. Thus, as found by the Supreme Court of Georgia, no basis was shown which would justify the granting of a challenge for cause in regard to potential juror Powell. Although the venireman did indicate that he was in favor of the death penalty, the venireman at no time indicated that his feelings in favor of the death penalty were so unyielding that he could not abide by the law as given to him in the charge of the court and consider mitigating circumstances. Thus, the trial court properly declined to excuse this juror for cause.

The Supreme Court of Georgia also examined the voir dire questions and answers concerning potential juror Bright. The court noted, "The transcript of the voir dire of the second juror shows that he stated that although he believed death to be the appropriate penalty for murder committed with aggravating circumstances, he also acknowledged that his mind could be changed." Godfrey v. Francis, 251 Ga. at 668. The court went on to note in conclusion, "The attitude expressed by this juror does not show sufficient evidence of bias or unwillingness to consider the evidence in light of applicable law as charged by the court to require his dismissal for cause. . ." Id. at 669. Therefore, it is clear that this juror also did not meet the requisite standards for excusal for cause.

The United States Court of Appeals for the Eleventh Circuit has addressed a similar question and noted, "a person who favors the death penalty can be entrusted to make the choice between death and life imprisonment unless the person's bias for capital punishment is unequivocal and absolute." Hance v. Zant, 696 F.2d 940, 956 (11th Cir. 1983); see Witherspoon v. Illinois, supra, 391 U.S. at 519, 522 n. 21. In the instant case, an examination of the voir dire clearly reveals that neither juror challenged expressed an unequivocal and absolute bias for capital punishment. Therefore, this allegaton is without merit.

III. THE CHARGE AT THE GUILT-INNOCENCE PHASE WAS NOT IMPERMISSIBLY BURDEN-SHIFTING.

Petitioner asserts that this Court should grant certiorari to consider the charge given during the guilt-innocence phase of the trial. In particular, Petitioner challenges the portion of the charge dealing with intent and the portion of the charge dealing with malice. Petitioner asserts that these charges created impermissible presumptions which were not cured by any other instructions. Petitioner cites the decision by the Eleventh Circuit Court of Appeals in Franklin v. Francis, 720 F.2d 1206 (11th Cir. 1983), in addition to the decision of this Court in Sandstrom v. Montana, 444 U.S. 510 (1979).

On appeal from the denial of habeas corpus relief, the Supreme Court of Georgia evaluated the charge given at the guilt-innocence phase of the trial. The court noted that the trial court charged, "the acts of a person of sound mind and discretion are presumed to be the product of a person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." Godfrey v. Francis, 251 Ga. at 654-5.

In evaluating this charge, the Supreme Court of Georgia noted that it had previously expressed a preference for the use of the language "you may infer" rather than using the word "presumed." The court went on to note that it had previously found that no conclusive presumption was charged when the jury was adequately instructed that the presumption may be rebutted. Id.; Hosch v. State, 246 Ga. 417, 271 S.E.2d 817 (1980). The court concluded that in light of the charges given on the presumption of innocence, the burden of proof, reasonable doubt, and intent as a jury question, the charge did not shift the burden of persuasion to the Petitioner. "Where, as here, instruction on rebuttal is incorporated into the charge, the burden of persuasion on the element of intent is

not shifted to the accused in violation of the Fourteenth Amendment's due process requirement that the state prove every element of a crime beyond a reasonable doubt." Godfrey v. Francis, 251 Ga. at 655.

The Eleventh Circuit Court of Appeals has considered similar charges on numerous occasions. In Hance v. Zant, 696 F.2d 940 (11th Cir. 1983), the court considered a charge which was phrased in terms of "may be inferred." The court noted that even if this particular charge in isolation were impermissible, the Petitioner would still have to show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141 (1973). The instruction should be considered in light of the entire jury charge and the entire trial. Lamb v. Jernigan, 683 F.2d 1332, 1339 (11th Cir. 1982). The Eleventh Circuit Court of Appeals in Hance, supra, noted that the court specifically charged the jury that the defendant was presumed innocent until proven guilty, that a person would not be presumed to act with criminal intention, that the state must prove the existence of criminal intent beyond a reasonable doubt, that intent must be found from the evidence produced at trial and that circumstantial evidence alone would not justify a finding of guilt unless the circumstances were entirely inconsistent with any other reasonable hypothesis supporting a finding of innocence. Hance v. Zant, supra, 696 F.2d at 953. Based on those instructions, the court concluded that it was unlikely that the jury would have interpreted the challenged instruction on intent as impermissibly burden-shifting. The court then went on to find that the challenged instruction itself was not unconstitutional by finding that the presumption stated was simply permissive. "A reasonable jury could only interpret this language as permitting the inference described -- they were allowed to draw the inference, but they were not obligated to do so." Id.

In Corn v. Zant, 708 F.2d 549 (11th Cir. 1983), the Eleventh Circuit Court of Appeals examined a charge in which the jury was instructed "the law presumes every intentional homicide to be malicious until the contrary appears from circumstances of alleviation and justification, mitigation or excuse." Id. at 558. The court also examined a portion of the charge dealing with a presumption of intent based upon the person being of sound mind and discretion. The court noted that it must determine whether a reasonable jury might have failed to understand that there was a rebuttable presumption of intent or malice and that they were free to weigh all of the evidence. Id, citing Sandstrom v. Montana, supra. The court concluded that in light of the overall charge given by the trial court, the burden of proof was not shifted to the Petitioner. The court noted that the instructions in Sandstrom contained no curative language to the effect that the presumpion of intent could be rebutted. Corn v. Zant, supra, at 559. Based upon a consideration of the totality of the charge, the Eleventh Circuit Court of Appeals concluded that the charge was not impermissibly burden-shifting in that case.

Petitioner has asserted that the decision in the instant case conflicts with certain decisions of the Eleventh Circuit Court of Appeals, particularly referring to the decision by that court in Brooks v. Francis, 716 F.2d 780 (11th Cir. 1983). The decision in that case is totally inapplicable to the instant case as the charge was completely different. In Brooks v. Francis, supra, the trial court instructed the jury:

> The law, ladies and gentlemen, presumes every homicide to be malicious until the contrary appears from circumstances of alleviation, excuse or justification, and it is incumbent upon the accused to make out such circumstance to your satisfaction unless they appear from the evidence produced against him.

Id. at 793.

That charge was found by the Eleventh Circuit Court of Appeals to be burden-shifting, but under the facts of the case the court concluded that it was harmless error. That charge was not present in the instant case and is not a basis for any decision by any of the lower courts. Therefore, the decision by the Eleventh Circuit in that case does not relate to the instant case.

In Franklin v. Francis, 720 F.2d. 1206 (11th Cir. 1983), the Eleventh Circuit Court of Appeals appears to contradict certain of its own prior decisions. Unlike the decision in Corn, supra, the court in that case found that the charge wa burden-shifting. The court then went on to examine the facts of the case and found that under the facts of the case, the instructions were impermissibly burden-shifting. The court also concluded that the charge was not harmless error. Respondent submits that the mere fact that the Eleventh Circuit in one particular case concluded that a similar charge was burden-shifting, serves as no basis for a conclusion that the instant charge was burden-shifting, particularly when that decision by the Eleventh Circuit appears to be in direct conflict with a majority of the cases by that court.

More recently, the Eleventh Circuit has again considered similar instructions as those in the instant case. In Tucker v. Francis, 723 F.2d 1504 (11th Cir. 1984), the court evaluated a charge virtually identical to that given in the instant case an found that the language given was not unconstitutional under Sandstrom. "The instruction repeatedly announces its own permissiveness." Id. at 15, 17. Similarly, Respondent would urge this Court to conclude that the charge in the instant case was not susceptible to an interpretation that would have relieved the prosecution of its burden of proving intent.

Finally, the Eleventh Circuit Court of Appeals has recently examined a charge concerning a presumption of intent in Drake v. Francis, No. 83-8047 (11th Cir. Feb. 29, 2984). The court

noted the distinctions between the language in that case also found in the instant case, and that in Sandstrom v. Montana, on the one hand and Hance v. Zant on the other. The court noted that the language initially appeared to be more similar to that in Sandstrom than in Hance; "however, the charge was not left standing alone, but was surrounded by curative instructions." Id. After an evaluation of the charge, the court concluded that it was bound by the decision in Corn v. Zant, supra and found that the intruction was not burden-shifting. The court then went on to note that a finding of intent did not play a crucial role in the outcome of the case and even noted that the charge could have possibly been harmless error in that circumstance.

Respondent submits that an evaluation of the charge as a whole in the instant case clearly shows that it was not impermissibly burden-shifting. The decision by the Supreme Court of Georgia falls squarely in line with the majority of the decisions of the Eleventh Circuit Court of Appeals. The only decision in conflict is that in Franklin v. Francis, which appears itself to conflict with the remainder of the decisions of the Eleventh Circuit, including two more recent decisions. An evaluation of the entire charge shows that the jury would not have interpreted the charge as impermissibly shifting the burden of proof to the Petitioner on the issue of intent. Furthermore, Respondent would also urge this Court to note that even if the charge were permissibly burden-shifting, it was harmless under the facts of the instant case.

Petitioner also challenges a separate portion of the charge dealing with malice. The Petitioner challenged that portion of the charge of the court dealing with express malice. The trial court charged, "Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned

and malignant heart." Godfrey v. Francis, 251 Ga. at 655. In reviewing this issue, the Supreme Court of Georgia merely noted that it had examined and approved this charge in Franklin v. State, 245 Ga. 141, 263 S.E.2d 666 (1980).

The Eleventh Circuit Court of Appeals has reviewed this exact charge and upheld the charge based on a similar challenge. In reviewing the charge, the court noted, "This instruction tells the jury that a finding of malice may be based entirely on circumstantial evidence. It does not relieve the prosecution from its burden of proving malice beyond a reasonable doubt." Hance v. Zant, supra, 696 F.2d at 953. Respondent would submit that this reasoning is correct under the circumstances of the instant case. The charge in question is simply definitional in nature and does not shift the burden of proof in any manner, but merely establishes that malice may be implied or express and defines the circumstances under which either may be found.

Petitioner asserts that the Supreme Court of Georgia Supreme Court's reliance on Franklin v. State, is questionable in light of the reversal in Franklin v. Francis. It should be noted that the Eleventh Circuit Court of Appeals in Franklin v. Francis did not consider whether the malice instruction was unconstitutional. Therefore, its prior decision in Hance v. Zant, supra, is controlling in the Eleventh Circuit as to this particular charge. Respondent asserts that Petitioner has shown no reason which would justify a conclusion that the charge on malice was impermissibly burden-shifting.

Based on the entire circumstances of the case, Respondent asserts that the charges in question did not impermissibly shift the burden of proof to the Petitioner on any essential element of the crime. Therefore, no reason exists which would justify this Court in granting certiorari to consider the charge in question. The decision of the lower court fully complies with this Court's holding in Sandstrom v. Montana, supra.

CONCLUSION

For all the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of Petitioner, Robert Franklin Godfrey.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General

Marion O. Gordon
MARION O. GORDON
First Assistant Attorney General

William B. Hill, Jr.
WILLIAM B. HILL, JR.
Senior Assistant Attorney General

Mary Beth Westmoreland
MARY BETH WESTMORELAND
Assistant Attorney General

MARY BETH WESTMORELAND
132 State Judicial Building
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3349

CERTIFICATE OF SERVICE

I, MARY BETH WESTMORELAND, a member of the bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for the Respondent upon the Petitioner by depositing copies of the same in the United States mail with proper address and adequate postage to:

Ellen Kreitzberg
1810 California Street N.W.
Apartment 302
Washington, D. C. 20009

Gerald I. Fisher
419 Seventh Street N.W.
Suite 202
Washington, D. C. 20004

This 9th day of March, 1984.

Mary Beth Westmoreland
MARY BETH WESTMORELAND